

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 09, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NICOLE BREANN M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. 1:23-CV-03063-SAB

**ORDER REVERSING THE
DECISION OF COMMISSIONER**

Plaintiff brings this action seeking judicial review of the Commissioner of Social Security's final decision denying her application for social security benefits. Plaintiff is represented by D. James Tree. The Commissioner is represented by Edmund Jack Darcher, Brian M. Donovan and Ryan Ta Lu. Pending before the Court are Plaintiff's Opening Brief, ECF No. 8, the Commissioner's Brief, ECF No. 10, and Plaintiff's Reply Brief, ECF No. 11.

After reviewing the administrative record, briefs filed by the parties, and applicable case law, the Court is fully informed. For the reasons set forth below, the Court reverses the Commissioner's decision.

I. Jurisdiction

On April 20, 2020, Plaintiff filed an application for Title XVI application

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1 supplemental security income with the onset date of December 8, 2017. She later
2 amended the alleged onset date to April 20, 2020, the filing date. Plaintiff's
3 application was denied initially and on reconsideration. Plaintiff timely requested a
4 hearing.

5 On December 22, 2021, the ALJ held a telephonic hearing. Plaintiff
6 appeared and testified before an ALJ, with the assistance of her counsel Robert
7 Tree. Jaye Stutz, vocational expert also participated. On January 24, 2022, the ALJ
8 found that Plaintiff was not disabled.

9 Plaintiff requested review by the Appeals Council; the Appeals Council
10 denied the request on March 6, 2023. The Appeals Council's denial of review
11 makes the ALJ's decision the "final decision" of the Commissioner of Social
12 Security, which this Court is permitted to review. 42 U.S.C. §§ 405(g),
13 1383(c)(1)(3).

14 Plaintiff filed a timely appeal on May 5, 2023. ECF No. 1. The matter is
15 before this Court pursuant to 42 U.S.C. § 405(g).

16 **II. Five-Step Sequential Evaluation Process**

17 The Social Security Act defines disability as the "inability to engage in any
18 substantial gainful activity by reason of any medically determinable physical or
19 mental impairment which can be expected to result in death or which has lasted or
20 can be expected to last for a continuous period of not less than twelve months." 42
21 U.S.C. § 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be under
22 a disability only if their impairments are of such severity that the claimant is not
23 only unable to do their previous work, but cannot, considering claimant's age,
24 education, and work experiences, engage in any other substantial gainful work that
25 exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The
26 Commissioner has established a five-step sequential evaluation process to
27 determine whether a person is disabled in the statute. *See* 20 C.F.R.
28 § 404.1520(a)(4)(i)–(v), 416.920(a)(4)(i)–(v).

1 **Step One:** Is the claimant engaged in substantial gainful activities? *Id.*
2 § 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work done for
3 pay and requires compensation above the statutory minimum. *Keyes v. Sullivan*,
4 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in substantial
5 activity, benefits are denied. *Id.* § 404.1520(b), 416.920(b). If the claimant is not,
6 the ALJ proceeds to step two.

7 **Step Two:** Does the claimant have a medically-severe impairment or
8 combination of impairments? *Id.* § 404.1520(a)(4)(ii), 416.920(a)(4)(ii). A severe
9 impairment is one that lasted or must be expected to last for at least 12 months and
10 must be proven through objective medical evidence. *Id.* §§ 404.1509, 416.909. If
11 the claimant does not have a severe impairment or combination of impairments, the
12 disability claim is denied. *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
13 impairment is severe, the evaluation proceeds to the third step.

14 **Step Three:** Does the claimant's impairment meet or equal one of the listed
15 impairments acknowledged by the Commissioner to be so severe as to preclude
16 substantial gainful activity? *Id.* § 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the
17 impairment meets or equals one of the listed impairments, the claimant is
18 conclusively presumed to be disabled. *Id.* § 404.1520(d), 416.920(d). If the
19 impairment is not one conclusively presumed to be disabling, the evaluation
20 proceeds to the fourth step.

21 Before proceeding to the fourth step, the ALJ must first determine the
22 claimant's residual functional capacity (RFC). An individual's residual functional
23 capacity is their ability to do physical and mental work activities on a sustained
24 basis despite limitations from their impairments. *Id.* § 404.1545(a)(1),
25 416.945(a)(1). The RFC is relevant to both the fourth and fifth steps of the
26 analysis.

27 **Step Four:** Does the impairment prevent the claimant from performing work
28 they have performed in the past? *Id.* § 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the

1 claimant is able to perform their previous work, they are not disabled. *Id.*

2 § 404.1520(f), 416.920(f). If the claimant cannot perform this work, the evaluation
3 proceeds to the fifth and final step.

4 **Step Five:** Is the claimant able to perform other work in the national
5 economy in view of their age, education, and work experience? *Id.*

6 § 404.1520(a)(4)(v), 416.920(a)(4)(v). The initial burden of proof rests upon the
7 claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*
8 *v. Apfel*, 108 F.3d 1094, 1098 (9th Cir. 1999). This burden is met once a claimant
9 establishes that a physical or mental impairment prevents him from engaging in her
10 previous occupation. *Id.* At step five, the burden shifts to the Commissioner to
11 show that the claimant can perform other substantial gainful activity. *Id.*

12 **III. Standard of Review**

13 The Commissioner's determination will be set aside only when the ALJ's
14 findings are based on legal error or are not supported by substantial evidence in the
15 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing
16 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance,"
18 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
19 evidence is "such relevant evidence as a reasonable mind might accept as adequate
20 to support a conclusion." *Richardson*, 402 U.S. at 401.

21 A decision supported by substantial evidence will be set aside if the proper
22 legal standards were not applied in weighing the evidence and making the decision.
23 *Browner v. Sec'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).
24 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the
25 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
26 1050, 1055 (9th Cir. 2006). The court must uphold the ALJ's denial of benefits if
27 the evidence is susceptible to more than one rational interpretation, one of which
28 supports the decision of the administrative law judge. *Batson v. Barnhart*, 359 F.3d

1 1190, 1193 (9th Cir. 2004). It “must consider the entire record as a whole,
2 weighing both the evidence that supports and the evidence that detracts from the
3 Commissioner’s conclusion, and may not affirm simply by isolating a specific
4 quantum of supporting evidence.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir.
5 2017) (quotation omitted). “If the evidence can support either outcome, the court
6 may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019.

7 **IV. Statement of Facts**

8 The facts have been presented in the administrative record, the ALJ’s
9 decision, and the briefs to this Court. Only the most relevant facts are summarized
10 here.

11 At the time of the hearing, Plaintiff was 30 years old. She earned a GED and
12 has taken some online college classes, but at the time of the hearing, she was on
13 academic probation. She indicates that she is unable to engage in fulltime work due
14 to her mental impairments. She has experienced severe depression since age 13.
15 She has a history of self-harm and started cutting at age 14. She has attempted
16 suicide a number of times.

17 Plaintiff suffers from depression and anxiety and has been diagnosed with
18 bipolar disorder. She also experiences mood swings and irritability. On her bad
19 days, she describes that it feels like there is somebody inside her head who is
20 pacing back and forth, and she can’t get the person to stop. Other days, she can
21 play video games, which helps shut down her brain. She testified that she averages
22 about one good day a week, and spends the other days in bed, unable to cope. Most
23 days, she is unable to leave the house. She mostly shops for groceries online and
24 has them delivered.

25 Plaintiff has a sporadic work history. Initially, she is excited about her new
26 job, but then within a week, her anxiety and depression increases, and she ends up
27 quitting. Her longest job lasted six months. Plaintiff received pandemic
28 unemployment benefits. During that time, she applied to numerous jobs but was

1 never hired.

2 At the time of the hearing, Plaintiff's children were 8 and 11. Her husband
3 and her parents assist with their care.

4 **V. The ALJ's Findings**

5 The ALJ issued an opinion affirming denial of benefits. AR 15-27. At step
6 one, the ALJ found that Plaintiff had not engaged in substantial gainful activity
7 since April 20, 2020, the application date and the amended onset date, but noted
8 that she did receive unemployment benefits after the alleged onset date. AR 17.

9 At step two, the ALJ identified the following severe impairments: bipolar
10 disorder; depression; anxiety; attention deficit hyperactivity disorder (ADHD);
11 post-traumatic stress disorder. AR 17.

12 At step three, the ALJ found that Plaintiff did not have an impairment or
13 combination of impairments that meets or medically equals the severity of one of
14 the listed impairments. AR 18.

15 At step four, the ALJ concluded that Plaintiff has an RFC to perform:

16 a full range of work at all exertional levels but with the following non-
17 exertional limitations: can understand, remember, and carry out
18 simple instructions and exercise simple workplace judgment; can
19 perform work that is learned by on the job training beyond a short
20 demonstration lasting up to and including one month; can respond
21 appropriately to supervision; can have occasional interaction with
22 coworkers; can deal with occasional changes in the work
23 environment; and can work in jobs that require no interaction with the
24 public to perform the work tasks (does not preclude working
25 environment where public is present).

26 AR 19.

27 At step five, the ALJ found that Plaintiff was capable of performing
28 representative work such as hand packager; cleaner, lab equipment; and laundry
worker II. AR 26. The ALJ found that Plaintiff was not disabled since April 20,
2020. AR 27.

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VI. Issues

1. Whether the ALJ properly evaluated Plaintiff's subjective complaints.
2. Whether the ALJ properly evaluated the medical opinion evidence.

VII. Discussion

A. Plaintiff's Subjective Testimony

Plaintiff argues the ALJ failed to provide specific, clear, and convincing reasons for discounting her subjective symptom testimony.

In determining whether a claimant's testimony regarding subjective pain or symptoms is credible, the ALJ engages in a two-step analysis. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014). "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Id.* (citation and quotation omitted). If the claimant satisfies the first step of the analysis, and there is no evidence of malingering, the ALJ can reject the claimant's testimony about the severity of their symptoms "only by offering specific, clear and convincing reasons for doing so." *Id.* (citation and quotation omitted). "This is not an easy requirement to meet: The clear and convincing standard is the most demanding required in Social Security cases." *Id.* (citation and quotation omitted). That said, if the ALJ's credibility finding is supported by substantial evidence in the record, the Court may not engage in second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

The ALJ found the medical evidence did not substantiate Plaintiff's allegations of disabling symptoms and limitations and that Plaintiff provided exaggerated or inconsistent information. The ALJ concluded that Plaintiff was able to independently meet her own personal needs, perform some household chores and care for her children. The ALJ concluded that Plaintiff's activities of daily living served as evidence that she was capable of managing herself in order to take

1 part in a relatively normal daily or weekly routine.

2 The ALJ failed to provide convincing reasons for rejecting Plaintiff's
3 symptom testimony. First, the ALJ erred in concluding that the medical evidence
4 does not substantiate her allegations' of disabling symptoms or limitations. Not
5 only is this not true, but the Social Security Regulations state that the ALJ's
6 credibility determination cannot be premised wholly on a lack of medical support
7 for the severity of their symptoms. *See* SSR 16-3p; *Light v. Soc. Sec. Admin.* 119
8 F.3d 789, 792 (9th Cir. 1997). Here, the medical records support that Plaintiff
9 suffers from anxiety and depression that interfere with her ability to work.

10 Second, the ALJ relied on her therapist's recommendation that Plaintiff
11 exercise, get outside, watch TV and play video games to find that Plaintiff's
12 symptom testimony was not credible. The ALJ erred in doing so, and seemingly
13 failed to appreciate the difference between recommendations and what Plaintiff
14 was actually capable of doing. Also, as Plaintiff explained at the hearing, on bad
15 days, she cannot play video games, but on some days, playing video games calms
16 her brain and minimizes the feeling that a person is pacing back and forth in her
17 head. This is not convincing evidence that Plaintiff is not being credible regarding
18 her symptom testimony.

19 Third, the ALJ rejected Plaintiff's testimony regarding her symptoms
20 because her daily activities are not limited to the extent one would expect. This is
21 not a convincing reason because it is not true. While Plaintiff has children, she
22 testified that her husband, her parents, and others helped her care for them. The
23 record suggests that while Plaintiff may get her children off to school and performs
24 some household chores, many times she spends the rest of the day in bed due to
25 depression, which would not support full-time work. The record also demonstrates
26 that while Plaintiff has been able to take college classes, her progress is slow and at
27 the time of the hearing she was on academic probation. Thus, the fact that she has
28 engaged in online classes is not a convincing reason to reject her testimony.

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1 Finally, the ALJ erred to finding that Plaintiff's sporadic work history
2 suggests that her failure to engage in full time work was not entirely related to her
3 impairments. This is not convincing because, as Plaintiff's testified, she has a
4 pattern of starting a job, feeling excited, but then due to her depression and anxiety,
5 she is unable to continue to work. On the contrary, substantial evidence supports
6 that Plaintiff's long-standing mental impairments interfere with her ability to
7 maintain employment. While the ALJ pointed to Plaintiff's receipt of pandemic-
8 associated unemployment benefits to find she was not credible, there is nothing in
9 the record to indicate whether she could perform full-time or only part-time work.
10 *See Carmickle v. Commissioner*, 533 F.3d 1155, 1161-62 (9th Cir. 2008).

11 The ALJ erred by failing to provide clear and convincing reasons for
12 rejecting her symptom testimony.

13 **B. Evaluation of the Medical Opinions**

14 The ALJ rejected the medical opinion of consultative examiner Kathryn
15 Johnson, Ph.D. The ALJ concluded that Dr. Johnson's opinion finding marked
16 limitations were not supported by Dr. Johnson's mental status examination, which
17 was within normal limits. The ALJ found that Dr. Johnson did not explain her
18 opinion, did not provide adequate functional limitations, and relied heavily on the
19 subjective report of symptoms and limitations provided by Plaintiff, which the ALJ
20 concluded were not entirely reliable. The ALJ concluded that Dr. Johnson's
21 opinions were inconsistent with the medical evidence of record.

22 In evaluating medical opinion evidence, the ALJ considers the
23 persuasiveness of each medical opinion and prior administrative medical finding
24 from medical sources. 20 C.F.R. § 416.920c(a) and (b). The ALJ is required to
25 consider multiple factors, including supportability, consistency, the source's
26 relationship with the claimant, any specialization of the source, and other factors
27 (such as the source's familiarity with other evidence in the file or an understanding
28 of Social Security's disability program). 20 C.F.R. § 416.920c(c)(1)-(5).

1 Supportability and consistency of an opinion are the most important factors,
2 and the ALJ must articulate how they considered those factors in determining the
3 persuasiveness of each medical opinion or prior administrative medical finding. 20
4 C.F.R. § 416.920c(b)(2). The ALJ may explain how they considered the other
5 factors, but is not required to do so, except in cases where two or more opinions
6 are equally well-supported and consistent with the record. *Id.*

7 Supportability and consistency are further explained in the regulations:

8 (1) Supportability.

9 The more relevant the objective medical evidence and
10 supporting explanations presented by a medical source are to support
11 his or her medical opinion(s) or prior administrative medical
12 finding(s), the more persuasive the medical opinions or prior
13 administrative medical finding(s) will be.

14 (2) Consistency.

15 The more consistent a medical opinion(s) or prior
16 administrative medical finding(s) is with the evidence from other
17 medical sources and nonmedical sources in the claim, the more
18 persuasive the medical opinion(s) or prior administrative medical
19 finding(s) will be.

20 *Id.*

21 Plaintiff argues the ALJ reversibly erred by improperly rejecting Dr.
22 Johnson's opinion. The Court agrees. The ALJ ignored the fact that Dr. Johnson
23 diagnosed Plaintiff with Bipolar II disorder and Unspecified Anxiety Disorder, and
24 failed to appreciate that mental health issues commonly wax and wane. The ALJ
25 also failed to appreciate that Dr. Johnson's conclusions were based on
26 observations, diagnoses, and prescriptions, in addition to Plaintiff's self-reports.
27 The ALJ also failed to identify any longitudinal evidence that contradicted Dr.
28 Johnson's assessment or undermined her conclusions. Given that the ALJ erred in
finding that Plaintiff was not credible, the ALJ erred in relying on the fact that Dr.
Johnson relied, in part, on Plaintiff's self-reporting to find that Dr. Johnson's
opinion was not supported or consistent with the record.

1 The record does not support a finding that Dr. Johnson's opinion was
2 inconsistent with the notes of Plaintiff's therapist, Ms. Lopaze. While the notes
3 indicated some improvement with medication and therapy, Ms. Lopaze's notes
4 failed to support any conclusion that Plaintiff had improved to the point of being
5 able to work.

6 Substantial evidenced does not support the ALJ's conclusion that Dr.
7 Johnson's opinion was not consistent with nor supported by the record.

8 **VIII. Conclusion**

9 Once the improperly rejected evidence is considered, it is clear that Plaintiff
10 is disabled because she is incapable of working on a regular and continuing basis.
11 As such, a remand for an immediate award of benefits is appropriate.

12 Accordingly, **IT IS HEREBY ORDERED:**

13 1. For docket purposes, Plaintiff's Opening Brief, ECF No. 8 and Reply
14 Brief, ECF No. 11, are **GRANTED**.

15 2. For docket purposes, the Commissioner's Response Brief, ECF No.
16 10, is **DENIED**.

17 3. The decision of the Commissioner is **REVERSED** and **REMANDED**
18 for an immediate award of benefits.

19 4. Judgment shall be entered in favor of Plaintiff and against Defendant.

20 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
21 file this Order, provide copies to counsel, and **close** the file.

22 **DATED** this 9th day of November 2023.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is fluid and cursive, written over a horizontal line.

28
Stanley A. Bastian
Chief United States District Judge